UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 117

Docket No. DC-0752-11-0807-I-1

Gary M. Solamon,

Appellant,

v.

Department of Commerce,

Agency.

October 23, 2012

Gary M. Solamon, Washington, D.C., pro se.

Adam Chandler, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his reduction in pay appeal for lack of jurisdiction. For the reasons set forth below, we AFFIRM the initial decision.

BACKGROUND

¶2 The appellant is an employee of the agency's Bureau of Economic Analysis (BEA). The BEA's personnel and pay practices are governed by an alternative personnel management system known as the Commerce Alternative Personnel

System (CAPS).[1] This system was first authorized as a demonstration project under 5 U.S.C. § 4703 and was approved by the Office of Personnel Management (OPM) on December 24, 1997. *See* 62 Fed. Reg. 67,434 (Dec. 24, 1997). On December 26, 2007, Congress extended the project indefinitely. Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 108, 121 Stat. 1844 (2007); *see also* 74 Fed. Reg. 22,728 (May 14, 2009).

¶3 Under CAPS, employees in supervisory positions, defined as positions that require incumbents to spend at least 25 percent of their time performing certain supervisory duties, are eligible to receive additional supervisory performance pay of up to 6 percent of the maximum rate of their pay bands. 62 Fed. Reg. at 67,452. Supervisory performance pay is considered a part of basic pay. *Id*. The payment of supervisory performance pay is not considered a promotion or a competitive action and is canceled when the employee's supervisory duties are discontinued. *Id*. Under CAPS, "[t]he cancellation of supervisory pay does not constitute an adverse action, and there is no right of appeal under 5 U.S.C. Chapter 75." *Id*. Thus, CAPS requires a partial waiver of 5 U.S.C. § 7512(4), which would otherwise cover any reduction in basic pay. 62 Fed. Reg. at 67,463; *see* 5 U.S.C. § 7511(a)(4) (defining "pay" as the rate of basic pay fixed by law or administrative action for the position held by an employee).

¶4 On August 8, 2005, the appellant was reassigned from the Pay Band IV position of Accountant to the Pay Band IV position of Supervisory Financial Management Specialist (Chief). Initial Appeal File (IAF), Tab 11, Agency Exhibit D. The appellant's basic pay rate prior to the reassignment was $106,325.00, and his basic pay rate as Chief, including his supervisory performance pay, was $113,000.00. *Id*. Effective April 25, 2011, the agency

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[1] Prior to the passage of the Consolidated Appropriations Act of 2008, the system was known as the Department of Commerce Personnel Management Demonstration Project. *See* 74 Fed. Reg. 22728 (May 14, 2009).

reassigned the appellant from his Pay Band IV Chief position, with a total salary of $145,100.00, back to his nonsupervisory Pay Band IV Accountant position, with a total salary of $136,771.00. IAF, Tab 1 at 5, 7.

¶5 On July 21, 2011, the appellant filed an appeal with the Board alleging that he suffered an appealable reduction in pay because the agency's reassignment action resulted in the cancellation of his supervisory performance pay. *Id*. at 3, 5. The appellant further alleged that the agency's decision to "remove" him as Chief, cancel his supervisory pay, and restructure the Office of Financial Services violated merit system principles and was an abuse of discretion provided to BEA under CAPS. *Id*. at 5. The administrative judge notified the appellant that the Board may not have jurisdiction over his appeal and ordered him to submit evidence and argument on the jurisdictional issue. IAF, Tab 5. In addition, the administrative judge informed the appellant that his appeal appeared to have been untimely filed and ordered him to submit evidence and argument showing that he filed his appeal on time or that he had good cause for his filing delay. *Id*. Based on the written record, the administrative judge issued an initial decision dismissing the appeal, finding that the appellant failed to make a nonfrivolous allegation of jurisdiction. IAF, Tab 12, Initial Decision (ID) at 1, 8. The administrative judge also found that the Board had no jurisdiction to consider the appellant's claims that the agency ignored merit system principles and abused the discretion provided to BEA under CAPS, absent an otherwise appealable action. *Id*. at 8. Having dismissed the appeal for lack of jurisdiction, the administrative judge did not reach the timeliness issue. *Id*. at 8 n.*.

¶6 The appellant filed a petition for review reasserting his arguments that the agency subjected him to an appealable reduction in pay and violated merit system principles. Petition for Review (PFR) File, Tab 1. In addition, for the first time on petition for review, the appellant asserted that the agency's actions constituted a prohibited personnel practice under 5 U.S.C. § 2302(b)(12), which prohibits an agency from taking a personnel action, including any "decision concerning pay,"

if the taking of that action "violates any law, rule, or regulation implementing, or directly concerning, the merit systems principles contained in section 2301 of this title." PFR, Tab 1; *see* 5 U.S.C. § 2302(a)(2)(ix) and (b)(12).

¶7 By letter dated May 24, 2012, the Board requested OPM to provide an advisory opinion addressing the following questions:

> 1. Does the Board have jurisdiction under 5 U.S.C. § 7512(4) to review the appellant's reduction in pay?
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> 2. Does 5 U.S.C. § 4703 authorize the exclusion of the appellant's reduction in pay from Board jurisdiction? In addressing this question, we request OPM's interpretation as to what Congress intended in exempting demonstration projects from "any law or regulation relating to . . . *the methods of disciplining employees*" and whether such "methods of disciplining employees" include the statutory remedial process available to employees subject to disciplinary action?
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> 3. Whether and to what extent does the Board have jurisdiction to review the appellant's reduction in pay because it is inconsistent with merit system principles under 5 U.S.C. § 2301 or constitutes a prohibited personnel practice under 5 U.S.C. § 2302?

PFR File, Tab 5.

¶8 In response to the Board's request, OPM provided an advisory opinion expressing its view that the Board lacks jurisdiction over the appellant's loss of supervisory performance pay. PFR File, Tab 15. First, OPM explained that, under 5 U.S.C. § 4703(a), OPM may, for purposes of a demonstration project, authorize the waiver of any rule or regulation prescribed under Title 5, except for those specifically enumerated in subsection § 4703(c). *Id*. at 3-4. OPM further argued that the list of waivable provisions at § 4703(a) is illustrative, not exhaustive, and that § 7512(4) is therefore subject to waiver under § 4703(a), regardless of whether it is a law related to "the methods of disciplining employees" within the meaning of § 4703(a)(4). *Id*. at 4-5. Finally, OPM reasoned that, in the absence of an appealable action, the Board lacks jurisdiction to review the appellant's claims under §§ 2301 and 2302. *Id*. at 5-6. The parties have submitted replies to OPM's advisory opinion. PFR File, Tabs 17, 18.

ANALYSIS

The Board lacks jurisdiction over the cancellation of the appellant's supervisory performance pay.

¶9 As an initial matter, we note that the interpretation of 5 U.S.C. § 4703 contained in OPM's advisory opinion does not have the force of law and, therefore, does not warrant deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Rather, it is "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that OPM's interpretation has the "power to persuade." *Christensen*, 529 U.S. at 587 (quoting *Skidmore*). We find OPM's interpretation of 5 U.S.C. § 4703 to be persuasive and therefore entitled to *Skidmore* deference.

¶10 While the appellant in this case suffered a reduction in basic pay, which would ordinarily be covered under § 7512(4), CAPS purports to waive § 7512(4) in part by excluding from its coverage the cancellation of supervisory performance pay. The partial waiver of § 7512(4), if lawful, places the appellant's loss of supervisory performance pay outside the ambit of chapter 75 and thus outside the Board's jurisdiction under that chapter. *See Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985) (the Board's jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule, or regulation).

¶11 We agree with OPM that the partial waiver of § 7512(4) is lawful under § 4703. Section 4703(a) bestows on OPM the broad authority to "conduct and evaluate demonstration projects" that include features that are either not authorized by Title 5 or that are inconsistent with its provisions:

> Subject to the provisions of this section, the conducting of demonstration projects shall not be limited by any lack of specific authority under this title to take the action contemplated, or by any provision of this title which is inconsistent with the action, including any law or regulation relating to—

> (1) the methods of establishing qualification requirements for, recruitment for, and appointments to positions;
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> (2) the methods of assigning, reassigning, or promoting employees;
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> (3) the methods of assigning, reassigning, or promoting employees;
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> (4) the methods of disciplining employees;
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> (5) the methods of providing incentives to employees, including the provision of group or individual incentive bonuses or pay;
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> (6) the hours of work per day or per week;
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> (7) the methods of involving employees, labor organizations, and employee organizations in personnel decisions; and
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> (8) the methods of reducing overall agency staff and grade levels.

5 U.S.C. § 4703(a). OPM's authority to waive certain federal employment laws and regulations pursuant to § 4703(a) is limited by § 4703(c), which enumerates the provisions of Title 5 that may not be waived for purposes of a demonstration project. Among the enumerated exceptions is "any provision of chapter 23 of this title, or any rule or regulation prescribed under this title, if such waiver is inconsistent with any merit system principle or any provision thereof relating to prohibited personnel practices." 5 U.S.C. § 4703(c)(5).

¶12 As OPM correctly observes, it is unnecessary to decide whether § 7512(4) may be considered a law relating to "the methods of disciplining employees" because OPM's authority to waive provisions of Title 5 pursuant to § 4703(a), while limited by § 4703(c), is not limited to laws and regulations that relate to the specific topics listed at subsection (a)(1)-(a)(8). Well-established canons of statutory construction dictate that the use of the word "including," when coupled with the broad waiver language at § 4703(a)—which refers to "any" provision of Title 5 or its implementing regulations—means that the enumerated topics listed at subsection (a)(1)-(a)(8) are illustrative, not exhaustive. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012) (a definition introduced with the verb "includes" instead of "means" is "significant because it makes clear

that the examples enumerated in the text are intended to be illustrative, not exhaustive") (citing *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008)); *see also Crawford v. Department of the Army*, 117 M.S.P.R. 38, 44 (2011) (acknowledging the "canon of statutory construction that when the word 'includes' is followed by a list of examples, that list is generally considered non-exhaustive") (citations omitted). Moreover, legislative history indicates that Congress intended § 4703 to permit waiver of statutory appeal procedures not expressly excluded from OPM's general waiver authority:

> In recognition of changing public needs, Title VI of S. 2640 authorizes the Office of Personnel Management to conduct research in public management and carry out demonstration projects that test new approaches to federal personnel administration. Certain sections of the federal personnel laws would be waived for purposes of small-scale experiments. Among the subjects of possible projects are *appeals mechanisms*, alternative forms of discipline, security and suitability investigations, labor-management relations, pay systems, productivity, performance evaluation, and employee development and training.

S. Rep. No. 95-969, at 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2734 (emphasis added).

¶13 We further find that § 4703(c) does not preclude the partial waiver of § 7512(4) at issue in this appeal.[2] While the appellant contends that the agency's decision to cancel his supervisory performance pay was a prohibited personnel practice under § 2302(b)(12) and a violation of merit systems principles under § 2301, he has not alleged that the partial waiver of Board jurisdiction under § 7512(4) is itself inconsistent with §§ 2301, 2302(b)(12), or § 4703(c)(5), and

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[2] Under traditional canons of statutory interpretation, where a statute enumerates certain exceptions to a general rule, other nonenumerated exceptions are excluded. *See Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980); *Aguzie v. Office of Personnel Management*, 116 M.S.P.R. 64, ¶ 12 (2011). Unlike the list of waivable provisions at § 4703(a), the list of nonwaivable provisions at § 4703(c) is not preceded by the word "including" or any other language to indicate that the list is illustrative rather than exhaustive.

we discern no basis for reaching such a conclusion. Nor does the partial waiver of § 7512(4) under CAPS implicate any of the other nonwaivable provisions enumerated under § 4703(c). We therefore conclude that OPM's authorization of the partial waiver of § 7512(4) is consistent with the requirements of § 4703. In addition, we note that Congress has granted its imprimatur to the provisions of CAPS, including the partial waiver of § 7512(4), by passing legislation extending the program indefinitely. *See* Pub. L. No. 110-161, § 108, 121 Stat. 1844.

¶14 Because OPM lawfully waived § 7512(4) to the extent it would otherwise cover the cancellation of supervisory performance pay under CAPS, and also because Congress has since expressly approved CAPS in its entirety, we conclude that the appellant's loss of supervisory performance pay is not appealable to the Board. Furthermore, in the absence of an otherwise appealable action, we lack jurisdiction to review the appellant's claim that the agency violated merit systems principles and committed a prohibited personnel practice under § 2302(b)(12). *See Davis v. Department of Defense*, 105 M.S.P.R. 604, ¶¶ 15-16 (2007).

We forward the appellant's claims regarding a possible constructive demotion for docketing as a new appeal.

¶15 In his initial appeal and again on review, the appellant asserts that, after his reassignment to the Accountant position, the agency redistributed some of the supervisory duties he performed as a Supervisory Financial Management Specialist and upgraded his former position to Pay Band V. PFR File, Tab 1 at 4; IAF, Tab 1 at 5. We find that his assertions could constitute a constructive demotion claim cognizable under § 7512(3). The constructive demotion doctrine ordinarily applies where an employee was reassigned from a position which, due to issuance of a new classification standard or correction of a classification error, was worth a higher grade; the employee met the legal and qualification requirements for promotion to the higher grade; and he was permanently reassigned to a position classified at a grade level lower than the grade level to which he would otherwise have been promoted. *Bobie v. Department of the*

Army, 105 M.S.P.R. 592, ¶ 6 (2007); *Russell v. Department of the Navy*, 6 M.S.P.R. 698, 711 (1981). Under CAPS, § 7512(3) has been waived in part, but only to use bands in lieu of grades and to exclude from coverage reductions in band "not accompanied by a reduction in pay, due to the employee's pay being exceeded by the band minimum rate," an exception which is not relevant here. *See* 62 Fed. Reg. at 67,463. We therefore conclude that, substituting the term "band" for "grade" as appropriate, the constructive demotion doctrine may be available to the appellant.

¶16 It is well settled that an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *See, e.g.*, *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). Notwithstanding the appellant's allegation in his initial appeal, the administrative judge did not provide the appellant with explicit information concerning what was required to establish Board jurisdiction over a constructive demotion claim. Furthermore, neither the agency's submissions nor the initial decision set forth the jurisdictional requirements of a constructive demotion claim. Accordingly, we FORWARD the appellant's alleged constructive demotion claim for docketing as a separate appeal. *Cf. Searcy v. Department of Agriculture*, 115 M.S.P.R. 260, ¶ 15 (2010) (forwarding appellant's alleged involuntary resignation claim). The administrative judge must fully inform the appellant of what he is required to show in order to establish the Board's jurisdiction over an appeal of an alleged constructive demotion and of his burden to prove that his appeal has been timely filed or that good cause exists for his delayed filing. *See id*. The administrative judge shall afford the parties a reasonable opportunity to submit evidence and argument on both issues.[3] *See id*.

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[3] If appropriate, the administrative judge may resolve the forwarded appeal on timeliness grounds without making a determination as to jurisdiction. *Popham v. U.S. Postal Service*, 50 M.S.P.R. 193, 197-98 (1991). *But see Beaudette v. Department of the Treasury*, 100 M.S.P.R. 353, ¶ 11 (2005) (dismissing constructive removal appeal

ORDER

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

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on jurisdictional rather than timeliness grounds where Board clearly lacked jurisdiction).

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.